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FILED

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SECRETARY, BOARD OF
OIL, GAS & MINING

**BEFORE THE BOARD OF OIL, GAS & MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

IN THE MATTER OF THE REQUEST FOR AGENCY
ACTION OF LIVING RIVERS FOR AN ORDER
VACATING THE DIVISION'S DECISION
APPROVING THE PERMIT APPLICATION OF RED
LEAF RESOURCES, INC., FOR THE SOUTHWEST
#1 MINE, LOCATED IN SECTIONS 19, 20, 29,
AND 30, TOWNSHIP 13 SOUTH, RANGE 23
EAST, SLBM, AND SECTIONS 25 AND 36,
TOWNSHIP 13 SOUTH, RANGE 22 EAST, SLBM,
UINTAH COUNTY, UTAH.

**DIVISION'S REPLY TO PRE-HEARING
BRIEFS AND MOTIONS**

Docket No. 2012 - 17

Cause No. M/043/0103

Pursuant to R641-105-200 the Division hereby respectfully submits this Division's Reply To Pre-Hearing Briefs And Motions ("Reply"). This Reply will address: I) Red Leaf Resources' ("Red Leaf") Motion for Partial Summary Decision; II) Red Leaf's Motion in Limine; and III) the appropriate Scope and Standard of Review for the proceeding.

ARGUMENT

- I) PETITIONERS FAILED TO ESTABLISH A CONNECTION BETWEEN ANY BASIS FOR RELIEF AND SPECIFIC FACTS DEMONSTRATING THE DIVISION ERRED IN CONDITIONING APPROVAL OF THE NOI AND THEREFORE PARTIAL SUMMARY DECISION IS WARRANTED.**

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. of Civ. P.56(c). In other words, there are no facts in dispute. *See also, IHC Health*

Services, Inc. v. D & K Management, Inc., 2008 UT 73 (the word “genuine” means the court it is required to draw all reasonable inferences in favor of the nonmoving party).

Additionally, “[a]n adverse party may not rest upon the mere allegations or denials of the pleadings, but, must set forth specific facts showing that there is a genuine issue for trial.” Utah R. Civ. P. 56(e). *See also, Hall v. Fitzgerald*, 671 P.2d 224 (Utah 1983) (allegations or denials in pleadings are not sufficient basis for opposing summary judgment); *Christiansen v. Union Pacific R.R. Co.*, 2006 UT 180 (summary judgment is appropriate against a party who, after discovery, fails to set forth facts sufficient to establish the existence of an element essential to that party's case).

As correctly cited by Red Leaf, the Utah Administrative Procedures Act (“UAPA”) grants the Board the ability to grant a petition for summary judgment brought pursuant to Utah Rule of Civil Procedure 56(c). *See* Utah Code Ann. § 63G-4-102(4)(b); Utah Admin Code R641-100-500 (all rights, powers, and authorities in UAPA are reserved to the Board).

Summary judgment is appropriate because Living Rivers: i) failed state a specific claim regarding how the Division erred in conditioning approval of the NOI on a receipt of a groundwater permit from DWQ; ii) stated no connection between a specific statutory basis for relief in the Utah Mined Land Reclamation Act and specific facts demonstrating Division error; and iii) in the alternative, failed to support their general arbitrary and capricious claim by failing to state specific facts demonstrating how Living Rivers was substantially prejudiced by the Division’s actions.

- i) Petitioner’s claims that the Division erred in conditioning approval of the NOI on receipt of a ground water permit from DWQ are vague and difficult to ascertain.

Petitioner’s Request for Agency Action and Pre-Hearing Brief do not identify any law the Division violated or clearly articulate specific facts demonstrating why the Division’s

conditional approval was in error. However, to adequately respond to Red Leaf's Motion for Partial Summary Decision, the Division reads the pleadings in a light most favorable to Living Rivers and has identified two potential arguments that could be read as a reference to Division error: 1) there is a lack of a public record on Condition 1 and how the Division "factored" the DWQ request into their approval, *Living Rivers Pre-Hearing Brief* at 12, 23; and 2) conditioning the NOI was not in the spirit of the 1999 MOU and the Division should have waited to approve the project until DWQ finished their review. *Living Rivers' Pre-Hearing Brief*, at 22, 24. The following arguments assume that these are Living Rivers' arguments.

- ii) Summary judgment should be granted because Petitioners have pointed to no specific basis of relief in the Utah Mined Land Reclamation Act or specific facts demonstrating a genuine issue for trial.

Summary judgment should be granted because: 1) Living Rivers has not shown a basis for recovery in law, *Brown v. Weis*, 871 P.2d 552 (Ut. Ct App. 1994) (existence of dispute concerning even very significant facts does not preclude summary judgment where, no matter which way facts are resolved, plaintiff cannot establish basis for recovery); and 2) Petitioners have failed to fulfill their Utah Rule of Civil Procedure 56(e) burden to show specific facts that demonstrate the Division's conditional approval somehow did not meet the Utah Mined Land Reclamation Act and poses a genuine issue for trial.

The statute governing the release of a decision on a NOI only requires that the Division "mail the information relating to the land affected and the tentative decision to the operator and publish the information and the decision, in *abbreviated* form." Utah Code Ann. § 40-8-13(6)(b) (emphasis added). There is no specific statutory requirement that the published Notice of Tentative Approval include conditions to approval or that Living Rivers in particular be "served" the letter sent to the operator. See *Living Rivers' Pre-Hearing Brief*, at 12 (conditional approval

“was not served upon Living Rivers”). Similarly, besides requiring the Division to make a tentative decision within 30 days of receipt of the NOI or the last action of the operator, there is no statutory provision delineating the timing of or how and when the Division must conduct and release its decision on an NOI. Utah Code Ann. § 40-8-13(6)(a).

Ironically, instead of pointing to specific facts showing an error in compliance with the Utah Mined Land Reclamation Act, Living Rivers’ own Pre-Hearing Brief recites specific facts demonstrating Division *compliance* with the relevant statutory requirements. *Living Rivers’ Pre-Hearing Brief*, at 12. Living Rivers’ Pre-Hearing Brief correctly states that on October 20, 2011 the Division mailed a letter to James Patten of Red Leaf informing Red Leaf of the Tentative Approval that explicitly conditioned approval on compliance with Condition 1. *Id.* This demonstrates compliance with the Utah Mined Land Reclamation Act’s operator notification requirements. Similarly, Living Rivers’ brief correctly states that on that same day the Division published Notice of the Tentative Approval demonstrating Division compliance with the public notification requirements. *Id.*

Red Leaf’s Motion for Partial Summary Decision should be granted because Living Rivers has failed to show a connection between any basis relief in the Utah Mined Land Reclamation Act and specific facts demonstrating Division error that pose a genuine issue for trial.

- iii) Partial summary decision is appropriate on the alternative grounds that Living Rivers’ also failed to establish any specific facts to prevail on their general claim that conditioning the approval was “arbitrary and capricious.”

Setting the dispute about the appropriate standard of review aside and reading the pleadings in a light most favorable to Living Rivers, partial summary decision is also appropriate on alternative grounds. Similar to Living Rivers’ failure to point to specific grounds for relief in

in the Utah Mined Land Reclamation Act and specific facts demonstrating Division error, Living Rivers also failed to demonstrate specific facts to support its general claim that conditioning the permit substantially prejudiced them and was otherwise arbitrary and capricious. *See generally, Living Rivers Pre-Hearing Brief*, at 19 (Heading), 23-24.

As there is no statute governing conditional approval of a NOI, conditional approval is left to the discretion of the agency. *LPI Services v. McGee*, 215 P.3d 135 (Utah 2009) (when the operative terms of a statute are broad and generalized, these terms bespeak a legislative intent to delegate their interpretation to the responsible agency). *See also, WWC Holding Co. v. Pub. Service Comm'n.*, 2002 UT 23 (review of agency discretion is a reasonableness test). Conditional approval was reasonable because Utah Courts have held that administrative agencies have inherent authority to identify an existing requirement of law and make it a condition to granting a permit or a license. *Utah Dept. of Transp. v. ROA General, Inc.*, 972 P.2d 666 (Utah Ct. App. 1996). *See also, Utah Code Ann. § 40-8-17(i); Utah Admin. Code R647-1-102.3* (requiring an operator to comply with all other applicable statutes, rules and regulations, including those of the Utah Department of Environmental Quality).

While Living Rivers generally claims the conditional approval was “arbitrary and capricious,” *Living Rivers’ Pre-Hearing Brief*, at 19, 23-24, summary judgment is appropriate because they have failed to demonstrate specific facts that they were substantially prejudiced by the Division’s actions. *See Utah Code Ann. § 63G-4-403(4)* (relief is granted only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced). A person is “substantially prejudiced” when the agency’s erroneous interpretation or application is not harmless.” *See, National Parks Conservation Ass’n v. Board of Trustees of School and Institutional Trust Lands Admin.* 2010 UT 13 (speaking to final formal agency

action). "Harmless errors" are those that are sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings. *State v. Ferguson*, 250 P.3d 89, 95 (Ut. Ct. Ap. 2011).

First, Living Rivers has not shown how publishing the Condition 1 with the Tentative Approval would have affected the outcome of the proceedings. Both the Tentative Approval and Operator Notice documents were promptly posted to the Division's website and made available to the public at the Department of Natural Resources building. Specifically requiring information be published in *abbreviated form* indicates that statute does not intend for the entirety of permit to be published any potential protestant must exercise its due diligence to review the entirety of the NOI file to craft an informed protest. Utah Code Ann. § 40-8-13(6)(b). *See* Utah Code Ann. § 40-13-8(d) (protest statute). A diligent protestant would have reviewed the file provided by the Division and seen both the published Tentative Approval and the Operator Notice letter sent to James Patten. Consequently, publishing Condition 1 would have had no impact on the proceedings.

Second, Living Rivers failed to show it is prejudiced by the timing of the conditional approval and how waiting would have affected the proceedings because they have had several opportunities to present their objections to the Division. Living Rivers has now had several opportunities to present any information in opposition to the approval, i.e. the initial protest, the informal conference, and now a formal Board hearing.

In summary, Red Leaf's Motion for Partial Summary Decision is appropriate because Living Rivers has failed to clearly articulate a connection between any basis for relief in law and specific facts demonstrating there is a genuine issue for trial.

II) THE DIVISION AGREES THAT TESTIMONY FROM LIVING RIVER'S EXPERT KUIPERS ON THE ISSUES OF THE ECONOMIC STABILITY OF RED LEAF, RECLAMATION BONDING, AND 2012 BLM DRAFT PEIS SHOULD BE EXCLUDED.

The Division supports Red Leaf's Motion in Limine to exclude testimony from Living Rivers expert James R. Kuipers ("Kuipers") on the issues of the economic stability of Red Leaf, adequacy of the reclamation bonding, and opinions based on the BLM's 2012 Oil Shale and Tar Sands Draft Programmatic Environmental Impact Statement ("Draft PEIS"). However, the Division has no opinion on Mr. Kuipers' testimony regarding his experiences as mineral processing engineer and capsule stability.

The Division believes Red Leaf has provided the Board with the proper standard for the determining the admissibility, relevance, and reliability of expert testimony. *Motion in Limine*, at 3-4. Moreover, the Division agrees with the Red Leaf's policy argument that the Board should act as "gatekeeper" and only allow expert testimony based on proper foundations. *Id.* at 5. For efficiency, the Division will not repeat those standards but incorporate them herein.

- i) The Division agrees that testimony from Living River's expert Kuipers on the issues of the economic stability of Red Leaf, reclamation bonding, and 2012 BLM DRAFT PEIS should be excluded.

First, Red Leaf is correct to move for the exclusion of the testimony regarding the economic stability of Red Leaf as company. As argued, opinions must be supported by sufficient facts and data, and Kupiers has not established the proper foundation to speak to the specific economic viability of the Red Leaf project and economic viability of the company. *See* Utah R. of Civ. P.702(b)(1). Additionally, as argued, there is no provision of the Utah Mined Land Reclamation Act requiring the Division to assess the economic viability of large mining operation nor is there a Division policy to do so

Second, testimony regarding the adequacy of the reclamation bonding should be excluded because its inclusion would prejudice the other parties. Living Rivers is required to include in its Request for Agency Action "a statement of relief sought from the Board" and a "statement of the facts and reasons forming the basis for relief." Utah Admin. Code RR641-104-133.600, 133.700. Living Rivers did not include the adequacy of Red Leaf's reclamation bond in its original Request for Agency Action. Consequently, the Division was not on notice of the issue and did not address the issue in its pre-hearing brief, such as demonstrating to the Board the Division's periodic review and bond adjustment provisions, or identify or prepare the appropriate Division witness to speak to the adequacy of the Division's requested bond. *See* Utah Admin. Code R647-4-113(6) (adjustment of a surety including a 5 year review or request etc.).

While Living Rivers has not asked for leave to amend to include bonding claims, the Board rules adopt a substantially prejudiced standard when granting leave to amend. Utah Admin. Code R641-104-240. Allowing Mr. Kuipers to testify on the adequacy of the reclamation bonding would severely prejudice the Division because the Division has not been on notice to prepare a case on the issue.

Third, testimony and opinions based on the BLM's Draft PEIS should be excluded as irrelevant and unreliable. As argued by Red Leaf, the Draft PEIS is a draft and could change significantly before being published as final. Second, the Draft PEIS does not speak to or assess the specifics of the Red Leaf project and is therefore unreliable and irrelevant for the topic.

The Division does not have an opinion as to Red Leaf's motion to exclude Kuipers testimony regarding his experience as a mineral processing engineer or capsule stability.

III) THE BOARD SHOULD ADOPT THE STANDARD OF REVIEW PREVIOUSLY ADOPTED IN THE COAL HOLLOW MATTER BECAUSE IT IS BOARD PRECEDENT AND APPROPRIATELY ACCOUNTS FOR THE UNIQUE NATURE OF A FORMAL BOARD HEARING.

The Board should adopt the Standard of Review previously adopted by the Board in Docket No. 2009-019; Cause No. C/25/0005 ("*Coal Hollow SOR Order*"). In the *Coal Hollow SOR Order* the Board determined, "the Board, while reviewing other issues *de novo*, will accord deference to the Division's findings and decision where substantial technical analysis is involved." *Coal Hollow SOR Order*, at 5. Consequently, the Board will not set aside the Division's decision on a technical matter unless it is arbitrary and capricious as determined by a reasonableness standard. *Id.* at 4. In the *Coal Hollow SOR* the Board also determined that the Petitioner has the burden of proving that the Division erred in its decision with respect to its permit decision. *Coal Hollow SOR Order*, at 3.

The Division reiterates that the *Coal Hollow SOR* is appropriate for several reasons. First, the *Coal Hollow SOR* appropriately accounts for the unique nature of a formal Board hearing. The *Coal Hollow SOR* simultaneously meets the Board's practices and procedures that allow for a *de novo*-like hearing with evidence but also recognizes the role of the Division as the judge of technical facts by granting the Division deference on technical decisions. Second, the *Coal Hollow SOR* is Board precedent. The Board has already weighed similar issues regarding; what level of deference should the Division be afforded and how best to address the Board's lack of technical expertise if they sit as a fact finder.

CONCLUSION

In conclusion:

- 1) The Division supports Red Leaf's Motion for Partial Summary Decision as Petitioner's have failed to establish a connection between any basis for relief granted in law and specific facts demonstrating a genuine issue for trial.
- 2) The Division supports Red Leaf's Motion in Limine to exclude Living Rivers' expert testimony on the economic stability of Red Leaf and the Southwest Mine #1, the adequacy of reclamation bonding, and opinions based on the 2012 BLM Draft PEIS. The Division has no opinion on excluding testimony regarding Mr. Kuiper's experience as a mineral processing engineer or capsule stability.
- 3) The Division advocates for the standard of review adopted by the Board in the *Coal Hollow SOR Order*.

Respectfully submitted this 20th day of June 2012.



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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the forgoing **DIVISION'S REPLY TO PRE-HEARING BRIEFS AND MOTIONS** for Case No. M/043/0103, Docket No. 2012-17 to be mailed with postage prepaid to the address shown and emailed, the _____ day of June, 2012, to:

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